IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT

JAIPUR BENCH, JAIPUR

1. S. B. Sales Tax Revision Petition No.546/1999
Assistant Commissioner, Commercial Taxes, Alwar
Versus
M/s. Ramnarayan & Brothers, Alwar

2. S. B. Sales Tax Revision Petition No.25/2000
C.T.O., Special Circle-II, Kota
Versus
M/s. Associated Cement Company Ltd., Bundi

3. S. B. Sales Tax Revision Petition No.828/1999
C.T.O., Special Circle-II, Kota
Versus
M/s. J.K. Synthetics Ltd., Kota

Date of Judgment :: 7th September, 2007

PRESENT

Hon'ble Dr. Vineet Kothari, J.

REPORTABLE

Mr.Vinay Goyal for the petitioner-Revenue.
Mr.Vivek Singhal for the respondent-assessee.

BY THE COURT:

All these revision petitions give rise to a short but interesting question of law as to whether the surcharge imposed under Section 5H of the Rajasthan Sales Tax Act, 1954 (for short 'the R.S.T. Act') is applicable to the rate of C.S.T. payable on inter-state sales under the Central Sales Tax Act, 1956 (for short 'the C.S.T. Act') or not?

2. The Tax Board by the impugned order held that prior to deletion of the said provisions of Section 5H of the R.S.T. Act w.e.f. 8.3.1988, the said C.S.T. surcharge under Section 5H could not be imposed on inter-state sales made by the assessee during the relevant period.

3. The provisions of Section 5H of the R.S.T. Act as it then existed are reproduced hereunder:-

> "5H (1) Notwithstanding anything to the contrary contained in this Act, there shall be paid by a dealer, whose turnover in an assessment year exceeds the sum of Rs.75,000/- a surcharge at the rate of (twenty) percent of the amount of tax payable by him under this Act.
>
> Provided that the aggregate of the tax and surcharge payable under this Act in respect of Goods declared by section 14 of the Central Sales Tax Act, 1956 (Central Act 74 of 1956) to be special importance in inter-state trade or commerce shall not exceed the tax calculated at the rate specified in clauses (a) of section 15 of the said Central Act.
>
> (2) The provisions of this Act shall, so far as may be apply in relation to the surcharge payable under sub-section (1) as they apply to the tax payable under this Act".

4. The controversy came to be decided by the Hon'ble Supreme Court in the case of **Deputy Commissioner of Sales Tax Vs. Aysha Hosiery Factory (P) Ltd. (1992) 85 STC 106 (SC)** by holding that the surcharge or additional tax payable under the State Sales Tax Act would in effect add to the rate of tax payable under the C.S.T. Act on the inter-state sale or purchase of a commodity and that State rate referred, inclusive of surcharge would be the rate applicable under Section 8(1) read with Section 8(2A) of the C.S.T. Act. The relevant extract of the said judgment is reproduced hereunder for ready reference:-

> "The rates of tax in certain cases under the Central Act are linked to the rates fixed under the local Acts and that is how the amendment of the local Acts affects the rate under the Central Act. It is still the Central Act that is applied but only for purpose of fixing the rate of tax leviable under the Central Sales Tax Act the provisions of the Local Act are looked into. So construed there is no doubt that in all cases where the rate of tax under the local law is less than four per cent that will be the rate applicable to the inter-state sale of the same commodity if the provisions of section 8(2A) of the Central Sales Tax Act are applicable. The dealer undoubtedly would be paying at the rate as enhanced by the Additional Sales Tax Act and therefore that will be the rate, that is including the additional tax, that is to be taken into consideration for finding out the applicability of section 8(2A) of the Central Sales Tax Act and the rate of tax in respect of his inter-state sales

> turnover.
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> Had the additional sales tax imposed by the Kerala Additional Sales Tax Act, 1978, been imposed by simply amending the rates in the original Act the question of its levy on inter-state sales would not have arisen. This makes no difference and it is merely a matter of style of legislation. The additional sales tax levied is also sales tax of the same category as in the original Act. Both take the form of sales tax and in the case of assessment of local sales it makes no difference whether it is called tax and additional tax or one higher percentage of tax. In truth and effect it is a levy of tax on the sales or purchase of the dealers".

5. Therefore, as far as legal position with regard to the levy of surcharge imposed under the R.S.T. Act on inter-state sales made by the assessee is concerned, there is no much controversy in view of the law declared by the Hon'ble Supreme Court. However, learned counsel for the respondent-assessee urged that the Revenue was estopped from realizing such surcharge on inter-state sales for the following reasons:-

(a) That the Additional Commissioner, Commercial Taxes, Jaipur in an order under Section 12A of the R.S.T. Act, which empowers the Additional Commissioner to determine the disputed question had held by order dated 6.8.1986 in the case

of **M/s. Associated Cement Co. Ltd.** that such surcharge would not be payable on inter-state sales. The relevant extract of the said order is as under:-

> "I have carefully considered the rival contentions and after having perused the record and above cited cause laws, I do not find force in the contention of the learned D/R that the department has issued any circular to the effect to raise surcharge on interstate sales under section 8(2)(b) relevant to this question. The learned D/R has not even cited the number and date of the circular to which he referred to but on my part I tried to procure the departmental circular which is No.F.6(19)Tax/CCT/85/46/19733-20570 dated 13.8.85 to the effect that no surcharge is attracted under the provisions of CST Act. In a further clarifications of this circular vide No.F.10(23)Tax/CCT/85/52/22081-22807 dated 29.8.85 it was elucidated that CST is attracted on the goods (excepting declared commodities), which have rate of tax in the State, less than 4% then on interstate sale the rate of surcharge can be added by calculating accordingly. The applicant has however clearly stated that U/s 8(1) of CST Act the goods are liable to tax at 4% where covered by 'C' form, whereas it is 12% under Section 8(2)(b) when goods sold to unregistered dealers.
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> Thus the whole plank of the argument of the learned D/R is taken away on which he had based his contention. In fact the tenor of the circulars dated 13.8.1985 as well as 29.8.1985 is not to levy surcharge on CST and specifically where the rate of tax under RST is 4% or more and also by a plain reading of Section 5H it is clear that the surcharge of 10% is leviable on total tax amount whereas no such provision exists for levy of tax on total turnover

under CST Act. I, therefore, answer the question that no surcharge is leviable on the sales effected by bill No.R/33 dated 31.3.1986.

Sd/-
(C.L. Jain)
Additional Commissioner
Commercial Taxes, Rajasthan,
Jaipur".

(b) The relevant circulars referred to by the Additional Commissioner dated 13.8.1985 and 29.8.1985 issued by the Commissioner, Commercial Taxes Department are also reproduced hereunder for ready reference:-

राज
वाणि

क्रमांक:-प 0 16 (19) टै /सीसीटी/85/46/19733-20570 दिनांक: 13.8.85

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<u>परिपत्र</u>

विषय:- विक्रय कर पर अधिभार सरचार्ज की वसूली ।

जैसा कि आपको विदित ही है राज कर (संशोधन) अधिनियम, 1985 दिनांक 1.8.85 से प्रवृ गया है। इस अधिनियम द्वारा मूल अधिनियम में नवीन धारा 5 ज अत:

उपधारा (1) के अनुसार रूपये 75,000/- वार्षिक प (टर्न

ओवर) से ऊपर वाला प्र
द्वारा संदेय (पेबल) "विक्रय कर" पर 10% की दर से अधिभार देने के लिये उ (Declared goods) पर लागू नहीं है।

उपधारा (2) के अनुसार मूल अधिनियम के "कर" पर लागू सभी प्रावधान लागू होगें। इससे यह
विक्रय पत्रक में ग्राहकों से विक्रय कर अलग से वसूल करने वाला

अतिरि 10% की दर से अधिभार भी वसूल कर सकता है। इस प्रकार वसूल शुदा अधिभार भी विक्रय कर के साथ नियमानुसार राज कोष में चालान से जमा करायेगा।

यह अधिभार धारा 5क के अधीन संदेय क्रय कर पर भी वसूलीय है। इसी प्रकार धारा 2 (गगग) के अधीन "आक
" के पदार्थों पर संदेय विक्रय कर तथा धारा 5ख के अधीन पशुधन पर संदेय "कर" पर भी देय है कि अधिभार के
के अधीन संदेय के " पर आकर्षित नहीं होगा।

ह./-
(पी.एन.भ)
आयु ,
वाणि ,
राज , जयपुर।

क्रमांक: प 016 (19) टै /सीसीटी/85/46/20571-610 दिनांक 13.8.85
प्रतिलिपि सम / अधिकारी, प्रधान कार्यालय।

ह./-
(पी.एन.भ)
आयु

राज
वाणि

क्रमांक:- प 016 (23) टै /सीसीटी/85/52/22081 दिनांक 29 अग ,1985

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सम ,
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परिपत्र

विषय:- सरचार्ज के स

इस कार्यालय के परिपत्र सं0 प 16 (19) टै /सीसीटी/85/46/19733-20570 दिनांक 13/8/85 द्वारा विक्रय कर पर अधिभार (सरचार्ज) की वसूली के स

के
अधीन संदेय "के " पर आकर्षित नहीं होगा।

के
दर के स 8 में प्रावधान है। इस धारा की उप धारा (2 ए) के अनुसार जिन पदार्थों पर रा 4 प्रतिशत से कम है उन पर के
रा
चाहे वह कर अथवा किसी अ
हो।

इससे
किसी माल पर सरचार्ज लागू होने से पूर्व 2 प्रतिशत थी तब के 2 प्रतिशत से

रहेगी कि
लागू कर दर 2 प्रतिशत पर 10 प्रतिशत से 20 पैसे का सरचार्ज जोड कर कुल रू. 2.20 पै0 हो गया है तब के विक्रय कर की दर धारा 8 (2 ए) के अनुसार 2.20 प्रतिशत होगी न कि 2 प्रतिशत।

अत: यह
यद्यपि के
लागू नहीं होता है कि
छोड़कर अ
रा 4 प्रतिशत से कम है तो उस माल के
अ दर संगणित
(के) करते समय रा
अधिभार की राशि जोड़कर के
अवधारित (डिटरमिन) की जावे।

इस
में पूरा प्रचार किया जाय।

ह./-
(पी.एन.भ)
आयु
वाणि ,
राज ,जयपुर।

क्रमांक प.16(23) टै /सीसीटी/85/52/22808-834 दिनांक 29 अग ,1985

प्रतिलिपि:-

1. विशि ,वि (ग्रुप-4) विभाग, राज , जयपुर।
2. सम / अधिकारी, प्रधान कार्यालय
3. अ , राज
कामर्स ए , राज , एम.आई.रोड, जयपुर।

4. महामंत्री, फैडरेशन आफ राज
इ , जौहरी बाजार, जयपुर।
5. अ , राज
एसोशियेशन, जयपुर।
6. अ , टै
एसोशियेशन, राज , जयपुर।

ह./-
(पी.एन.भ)
आयु ,
वाणि ,
राज , जयपुर।

6. Learned counsel for the respondent-assessee further relied upon a decision of the Rajasthan Taxation Tribunal, Jaipur in C.T.O., Special Circle-II, Kota Versus M/s. J.K. Synthetics Limited in Sales Tax Revision Application No.12/1997 decided on 5.11.1998. The relevant Paras No.6,8 and 9 of the said decision are also reproduced hereunder for ready reference:-

> "6. Section 5H provides for the levy of surcharge on the amount of tax payable by a dealer whose turnover in an assessment year exceeds a sum of Rs.75,000/-. This surcharge is leviable on the amount of Tax which is payable by the dealer. Thus the dealer has first to collect the tax and at the time of the assessment if it is found that his turnover exceeds a sum of Rs.75,000/- then the surcharge is payable by him. In other words, this surcharge leviable under section 5H is not to be collected by him from the purchasers at the time the sale takes place and the amount of tax is collected. It thus becomes a tax in the form of surcharge not on the

sale of goods at the time when the taxable event occurs, but a tax at the time of the final assessment when it is found that the turnover exceeds Rs.75,000/-. It is a tax on the dealer himself which is relatable to the turnover. In fact it is a tax on the dealer of the particular category and not on the sale of goods. Apart from this the Deputy Secretary to the Government of Rajasthan on 21.8.85 in answer to a communication dated 8.8.85 made it clear that no surcharge was leviable on the tax payable under the Central Sales Tax Act. The Commissioner of Commercial Taxes on 13.8.85 in a circular to the Taxation Officers made it clear that no surcharge was leviable on tax under the CST Act. To the same effect were the orders dated 20.1.85 and 6.8.86 of the Additional Commissioner, Commercial Taxes, Rajasthan, Jaipur. Thus the Department took up the position that no surcharge was leviable on tax under the CST Act. In these circumstances no surcharge should be levied on tax under the CST Act. There is no provision for the levy of surcharge on CST under the CST Act. In the absence of specific provision to that effect no surcharge on CST can be levied and collected. Promissory estoppel operates not against the statute but against the Government provided any promise is held out on behalf of the Government and the promiser has acted thereon. In these circumstances no surcharge can be collected on tax under the CST Act. If such collection was made it was in violation of section 9A of the CST Act and for which the penalty provisions contained in section 10(f) of the CST Act can be attracted into application.

7. .....

8. Here we may note the points of distinction between the facts of Aysha Hosiery Factory case (supra) and those of the cases which are sought to be covered under section 5H of the RST Act. The first point of distinction is that the Kerala Additional Sales

> Tax Act sought to levy tax on all taxable sales and purchases in the State without any reference to the quantum of turnover as is done in the case of Rajasthan. The second point of distinction is that in the case of Kerala Additional Sales Tax Act tax was leviable at the time when the taxable event occurred whereas in the case of Rajasthan the surcharge is sought to be levied not at the time when the taxable event occurred but at the time of assessment when it was found that taxable turnover exceeded Rs.75,000/-. The third point of distinction is that no distinction was made in Kerala between two categories of dealers – one whose turnover was less than Rs.75,000/- and the other whose turnover exceeded Rs.75,000/-. Thus the ratio of Aysha Hosiery case (supra) is of no help to the Department. Thus, the decision in Rajasthan Weaving Mills case (supra), ex-hypothesis is of no help to the Department.
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> 9. With regard to the levy of interest it has been clearly laid down by the Apex Court in the case of Indian Carbon Ltd. Versus State of Assam (1997) 106 STC 460 = JT 97 (7) SC 4, that no interest is leviable under the CST Act. When the surcharge goes off the board the question of levying interest thereon does not arise".

7. As against this, learned counsel for the Revenue, Mr. Vinay Goyal, submitted that there is no question of estoppel against the statute and once it is held by the Hon'ble Supreme Court in Aysha Hosiery Factory Pvt. Ltd.'s case aforesaid that surcharge payable under Section 5H of the Act would add to the rate of tax payable for the purpose of C.S.T. Act also and there

is no need of any separate notification under Section 8(5) of the C.S.T. Act for that purpose, such tax would be payable by the respondent-assessee notwithstanding contrary circulars issued by the Department and also the decision of the Additional Commissioner under Section 12A of the Act. He relied upon the judgment of the Hon'ble Supreme Court in the case of **Bengal Iron Corporation and Another Vs. Commercial Tax Officer and Others (1990) 90 STC 47 (SC)** in which it was held by the Hon'ble Supreme Court regarding effect of clarifications and circulars issued by the State Government contrary to the legal position as follows:-

> "Clarifications/Circulars issued by the Central Government and/or the State Government represent merely their understanding of the statutory provisions. They are not binding upon the courts. It is true that those clarifications and circulars were communicated to the concerned dealers but even so ***nothing prevents the State from recovering the tax, if in truth such tax was leviable according to law. There can be no estoppel against the statute***. The understanding of the Government, whether in favour or against the assessee, is nothing more than its understanding and opinion. It is doubtful whether such clarifications and circulars bind the quasi-judicial functioning of the authorities under the Act. While acting in a quasi-judicial capacity, they are bound by law and not by any administrative instructions, opinions, clarifications or

> circulars. ***Law is that is declared by the Supreme Court and the High Court***, to wit, it is for the Supreme Court and the High Court to declare what a particular provision of the statute says, and not for the executive".

8. Having considered the rival submissions and the judgments cited at the bar, this Court is of the opinion that notwithstanding the circulars and clarifications issued by the Department as quoted above, which to the extent wrongly state that surcharge would not be payable on inter-state sales (dt. 13.8.1985) in view of the clear position declared by the Hon'ble Apex Court in Aysha Hosiery case (supra), the respondent-assessee would be liable to pay the C.S.T. rate of tax inclusive of the surcharge under Section 5H of the R.S.T. Act on the inter-state sales made by it during the period in question when the said provisions of Section 5H of the Act was on the statute book. It is well settled that there is no estoppel against the law or the statute. The order of the Additional Commissioner dated 6.8.1986 and the circular dated 13.8.1985 issued by the Commissioner, Commercial Taxes Officer being contrary to the law laid down by the Hon'ble Supreme Court cannot be sustained and cannot enure to the benefit of the assessee in any manner.

The later circular issued by the Commissioner on 29.8.1985 though wrongly states in Para 4 that surcharge is not payable on C.S.T., but correctly states that rate under R.S.T. Act inclusive of surcharge would be the applicable C.S.T. rate as per Section 8(2A) of the C.S.T. Act. However, even that circular dated 29.8.1985 is again wrong when it says in Para 4 that it would be so for goods other than the declared goods. The proviso to Section 5H(1) rightly states that for declared goods such applicable C.S.T. rate inclusive of surcharge will not exceed the rate limits given in Section 15 of the C.S.T. Act, 1956.

9. Moreover, the fact that the assessee could not collect the said portion of tax from its customers on the basis of these circulars and order of the Additional Commissioner under Section 12A of the Act is also of no avail to the assessees. Once it is held in law that the rate of tax applicable under the C.S.T. Act would be the rate as applicable under the R.S.T. Act inclusive of surcharge under Section 5H of the Act, as is the position of the law declared by the Hon'ble Supreme Court, the said law has to be given full effect and finding ways out not to apply such law declared by the Hon'ble Supreme Court as per under Article 141

of the Constitution of India right from day one would be contrary to the letter and spirit of Article 141 of the Constitution of India. Only when in particular cases, the Hon'ble Supreme Court itself has clarified and observed to make such law declared applicable only prospectively, it is so, otherwise, it cannot held to be so applicable prospectively in all cases. The position of law is otherwise and the law declared by Supreme Court would be binding retrospectively. In the present case, judgment of Apex Court in Aysha Hosiery's case does not hold it to have only prospective application after the date of judgment. Thus, it would be contrary to the said decision of the Hon'ble Apex Court to hold that the C.S.T. would be payable on the basis of the R.S.T. rates excluding surcharge under Section 5H of the Act. Such rates inclusive of surcharge is the rate applicable as per Section 8(1) and 8(2A) of the C.S.T. Act. Such rate inclusive of surcharge, of course, cannot be exceed 4% in case the goods which are declared goods under Section 14 of the C.S.T. Act. The proviso to Section 5H(1) itself takes care of that.

10. The contention of learned counsel for the assessee that Section 5H of the Act was attracted only in case, turnover of

an assessee exceeded Rs.75,000/- in a year and, therefore, rate applicable under C.S.T. Act cannot be held to be inclusive of surcharge under Section 5H of the Act before the turnover exceeds Rs.75,000/-, is of no avail to the assessee again. Firstly, the present cases before this Court are all those cases in which the turnover has far exceeded Rs.75,000/- per year. The one case is the case of marble dealer and the two other cases are those of cement manufacturers. Secondly, in the opinion of this Court, the cut off turnover of Rs.75,000/- given in Section 5H(1) of the Act does not alter the character of surcharge as rate of tax. The said cut off Rs.75,000/- is only to determine the point of time when the said provision would become applicable. Once the turnover exceeds Rs.75,000/-, the fact well within the knowledge of the dealer during the contemporary period, the rate of tax applicable on inter-state sales taxable under C.S.T. Act would be inclusive of surcharge under Section 5H of the Act. The rate applicable under R.S.T. Act including surcharge under Section 5H @ 20% of the rate payable under R.S.T. Act would be the rate applicable under C.S.T. Act. The words “a surcharge at the rate of 20% of the amount of tax payable by him under this Act” in Section 5H(1) of the Act is clearly indicative of the fact

that the said rate of surcharge is to be computed with reference to the rate of tax applicable under the R.S.T. Act by virtue of Sections 8(1) and 8(2A) of the C.S.T. Act, such rate under R.S.T. Act inclusive of surcharge under Section 5H of the R.S.T. Act becomes the rate applicable under C.S.T. Act. However, if for the entire year of a small dealer, the turnover does not exceed Rs.75,000/-, he need not pay any surcharge under Section 5H of the Act either on sales made within State under R.S.T. Act nor on inter-state sales under C.S.T. Act. But once his turnover exceeds Rs.75,000/-, such surcharge would be payable even on sales made prior to crossing of such cut off limit of Rs.75,000/- because rate applicable would always be inclusive of surcharge.

11. Therefore, in the considered opinion of this Court, neither order of the Additional Commissioner under Section 12A of the Act dated 6.8.1986, nor the circulars issued by the Commissioner, Commercial Taxes, which are contrary to law declared by the Hon'ble Supreme Court and, therefore, deserves to be quashed to the extent they are in such conflict, can stand in the way of Revenue from collecting such applicable C.S.T. rates inclusive of surcharge under Section 5H of the R.S.T. Act.

For the same reason, the view of the Rajasthan Taxation Tribunal in J.K. Synthetics case relied upon by the respondent-assessee as quoted above in Para 6 of the judgment also cannot hold the field. Accordingly, the said judgment on this issue of the Rajasthan Taxation Tribunal is also held to be not a good law in view of the decision of the Hon'ble Supreme Court in Aysha Hosiery case (supra). The alleged distinction of the said judgment of Apex Court sought to be made out in the aforesaid decision of the Rajasthan Taxation Tribunal is not based on sound reasoning and, therefore, the same does not hold any water in the opinion of this Court.

12. Consequently, these revision petitions are allowed and the impugned judgment of the Tax Board dated 8.3.1988 is set aside. The parties are to bear their own costs.

[**Dr. Vineet Kothari**],**J.**

S.S.
Jr.P.A.